MATAD SDN BHD

v.

NG CHEE KEONG

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
TENGKU BAHARUDDIN SHAH JCA
ZALEHA ZAHARI J
[CIVIL APPEAL NO: W-02-389-1998]
24 SEPTEMBER 2003

CONTRACT: *Brokerage contract - Commission - Sale of land - Whether plaintiff acted as "estate agent" - Whether contract void and unenforceable - Whether plaintiff entitled to recover commission - Valuers, Appraisers and Estate Agents Act 1981, ss. 2, 22C*

STATUTORY INTERPRETATION: *Construction of statutes - Contextual approach - Valuers, Appraisers and Estate Agents Act 1981, s. 22C*

WORDS & PHRASES: *"estate agent" - Valuers, Appraisers and Estate Agents Act 1981, s. 22C*

The defendant, which was interested in buying some land, promised to pay the plaintiff 1% commission for introducing land. The plaintiff introduced the defendant to a vendor with land for sale at a substantial price. The defendant bought the land but refused to pay the plaintiff his commission. Thus, the plaintiff brought an action to recover the sum promised. The defendant took two main defences, which were: (i) that it was not the plaintiff who introduced the land (the factual defence); and (ii) that the contract which the plaintiff sought to be enforced was illegal and void in that it contravened the Valuers, Appraisers and Estate Agents Act 1981 ('the Act') (the legal defence). The High Court found for the plaintiff on both issues. The defendant appealed against this decision, contending that the judge had misdirected himself on the point of illegality.

Held:
Per Gopal Sri Ram JCA

[1] The word "acting" in s. 2 of the Act must be read in the context of s. 22C of the Act, which was the section that contemplates someone who "practises as" or who may "carry on business" as "an estate agent". Words such as "practise" and "carry on business" point, not to an isolated

act, but to a course of conduct. The section also uses the term "estate agent". It is thus clear that the Act requires an estate agency relationship to exist between the parties, and in the absence of such a relationship, the Act has no application. (p 105 f-h)

[1a] In the present instance, the High Court specifically negatived the existence of such a relationship, but found that the plaintiff had been promised payment if he introduced a piece of land to the defendant. The High Court held that since the plaintiff's only knowledge was in respect of the existence of the land for sale and that he could put a prospective purchaser in contact with the vendors, what he had done did not qualify him to be within the category of a person who had given professional advice or services to the defendant as an estate agent. The High Court was correct in point of fact and in point of law. It was correct on the facts because the documentary and other evidence amply justified the factual finding it made, and it was correct in law because the court adopted a contextual approach to the construction of s. 22C of the Act. (p 106 a-e)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Defendan, yang berminat untuk membeli tanah, berjanji untuk membayar komisyen 1% kepada plaintif jika berjaya memperkenalkan tanah. Berikutnya, plaintif memperkenalkan defendan kepada seorang penjual yang mempunyai tanah untuk dijual pada harga yang amat tinggi. Defendan membeli tanah tersebut tetapi enggan membayar komisyen kepada plaintif. Plaintif kemudian mendakwa defendan dan menuntut bayaran yang dijanjikan. Defendan mengutarakan dua pembelaan utama, iaitu: (i) bahawa plaintif bukanlah orang yang memperkenalkan tanah (pembelaan faktual); dan (ii) bahawa kontrak yang hendak dilaksanakan oleh plaintif adalah tak sah dan batal kerana melanggar Akta Penilai, Pentaksir dan Ejen-Ejen Harta-Tanah 1981 ('Akta') (pembelaan undang-undang). Mahkamah Tinggi membuat keputusan yang berpihak kepada plaintif atas kedua-dua isu. Defendan merayu terhadap keputusan tersebut sambil berhujah bahawa hakim telah tersalah arah akan dirinya berhubung isu ketaksahan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Perkataan 'acting' dalam s. 2 Akta hendaklah dibaca dalam konteks s. 22C Akta, iaitu seksyen yang membayangkan seorang yang 'beramal' atau yang mungkin 'menjalankan perniagaan' sebagai seorang 'ejen harta-tanah'. Perkataan-perkataan seperti 'beramal' dan 'menjalankan perniagaan' tidak menunjuk kepada satu perbuatan yang terasing, tetapi kepada satu aliran kelakuan. Seksyen tersebut juga menggunakan terma 'ejen harta-tanah'. Ianya dengan itu jelas bahawa Akta mengkehendaki kewujudan suatu hubungan ajensi harta-tanah di antara pihak-pihak, dan dalam ketiadaan hubungan sedemikian, Akta adalah tidak terpakai.

[1a] Dalam kes semasa, Mahkamah Tinggi telah secara khusus menolak kewujudan satu hubungan seperti di atas, tetapi mendapati bahawa plaintif telah dijanjikan bayaran jika dia memperkenalkan sebidang tanah kepada defendan. Mahkamah Tinggi berpendapat bahawa oleh kerana pengetahuan plaintif hanyalah berkaitan kewujudan tanah untuk dijual dan bahawa beliau boleh mempertemukan bakal pembeli dengan penjual, apa yang beliau lakukan tidak melayakkan dirinya ke dalam kategori orang yang memberi nasihat atau khidmat profesional kepada defendan selaku ejen harta-tanah. Mahkamah Tinggi adalah betul dari segi isu fakta mahupun isu undang-undang. Ia betul di atas fakta kerana keterangan dokumentari dan lain-lain lebih dari menjustifikasikan dapatan fakta yang dibuatnya, dan ia betul dari segi undang-undang kerana mengambil pendekatan kontektual dalam pentafsiran s. 22C Akta.

Rayuan ditolak.]

Case(s) referred to:
Co-operative Central Bank Ltd (in receivership) v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 ***(refd)***
Gibb v. Federal Commissioner for Taxation [1966] 118 CLR 628, 635 ***(foll)***
K & S Lake City Freighters Pty Ltd v. Gordon & Gotch Ltd [1985] 60 ALR 509 ***(foll)***
Lim Eng Heng v. Lim Sam Keow [2003] 6 CLJ 1 ***(refd)***
Shamsudin v. Vijevacome [1971] 1 MLJ 7 ***(refd)***
Teh Swee Lian v. Teh Eng Peng [1998] 1 CLJ Supp 504 ***(foll)***
Yeep Mooi v. Chu Chin Chua & Ors [1981] 1 MLJ 14 ***(refd)***

Legislation referred to:
Valuers, Appraisers and Estate Agents Act 1981, ss. 2, 22C,

For the appellant - K Sureindhren (P Mithran); M/s Sothi & Ang
For the respondent - Daya Nair; M/s Nik Saghir & Ismail

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

The broader question that this appeal raises is the meaning of 'estate agency practice' as defined by the Valuers, Appraisers and Estate Agents Act 1981 ("the Act"). The narrower and immediate question at hand is whether the plaintiff in the suit (the respondent before us) may recover the commission promised him by the defendant (the appellant before us).

Although the Act has been on the statute books since 1981, there has not been much litigation about it. So far as advised by counsel, this is the first time that this court is seised of an appeal that deals with what an estate agent is under the Act. It is to be noted at once that the Act does not define "estate agent". Instead it defines "estate agency practice". And that definition (as provided in s. 2 of the Act) is as follows:

> 'estate agency practice' means acting or holding oneself out, to the public as ready to act, for a commission, fee, reward or other consideration, as an agent in respect of the sale or other disposal of land and buildings and of any interest therein or the purchase or other acquisition of land and buildings and of any interest therein or in respect of the leasing or letting of land and buildings and of any interest therein.

Learned counsel for the defendant (the appellant before us) made a sustained submission relying on the aforesaid definition. His complaint is that learned judge misdirected himself on the bifurcation within the definition between "acting as an agent" and "a holding out to the public" by treating both as a composite conduct. Our attention was drawn to a passage in the judgment under appeal to justify the complaint. This is what it says:

> In the present situation of our case, from the facts as disclosed, the plaintiff only mentioned the availability of the Land for sale to his good friend Encik Hakkim, who then referred him to the defendants. This disclosure cannot be considered as: having been done openly. It was in fact very discreet. It was restricted and confined to only 2 persons.
>
> It was a private conversation, certainly not opened to all members of the community. There was no announcement of this information to the public at large, nor was it published in any publication circulated in the open. For this, I am convinced that the plaintiff had not acted or held himself out to the public as ready to act for reward in introducing this land for sale.

Ex facie, it may be argued that the above quoted passage is flawed and, put at its highest, amounts to a misdirection. But we are not to be taken as saying that it does. We say that it **may**; that is all. And we find it unnecessary to deal with this part of the defendant's case because in our view counsel's argument overlooks a fundamental principle regarding definition clauses in statutes which principle we find requires re-statement. This is done easily enough by reproducing the following passage in the joint judgment of Barwick CJ, McTiernan and Taylor JJ in *Gibb v. Federal Commissioner for Taxation* [1966] 118 CLR 628, 635*:*

> The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense – or are to be taken to include certain things which, but for the definition, they would not include. Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way. .. Consequently the effect of the Act and its operation in relation to dividends as defined by the Act must, we think, be found in the substantive provisions of the Act which deal with 'dividends'.

It follows that what we must focus upon in a case concerned with the discovery of Parliamentary intention is the relevant provision of the particular statute. In the present case, it is s. 22C of the Act. That section in its material part reads:

> 22C. Restrictions on estate agency practice.
>
> (1) No person shall unless he is a registered estate agent and has been issued with an authority to practise under s. 16 –
>
> (a) practise or carry on business or take up employment under any name, style or title containing the words 'Estate Agent', 'House Agent', 'Property Agent', 'Land Agent', 'House Broker' or the equivalent thereto, in any language or bearing any other word whatsoever in any language which may reasonably be construed to imply that he is a registered estate agent;
>
> (aa) carry on business or take up employment as an estate agent;
>
> (d) be entitled to recover in any court any fees, charges or remuneration for any professional advice or services rendered as an estate agent."

It is trite that a provision in a statute does not apply or operate in vacuo but depends on a set of facts or more appropriately, a state of affairs. The facts here, which are said to make the definition relevant, may be shortly stated.

The defendant was interested in buying some land. The defendant promised the plaintiff to pay him 1% commission for introducing land. The plaintiff introduced the defendant to a vendor who had some land for sale. The price was substantial. It was in the region of RM42 million. The defendant bought the land. Later, the defendant refused to pay the plaintiff. So the plaintiff brought an action to recover the sum promised. The defendant took two main defences. First, that it was not the plaintiff who introduced the land (the factual defence); second that the contract sought to be enforced by the plaintiff was illegal and void in that it contravened the Act (the legal defence). The High Court found for the plaintiff on both issues. So far as the first issue is concerned, the High Court's findings are of pure fact based on the credibility of the witnesses who gave evidence at the trial. The defendant accepts these findings. Its complaint before us is that the judge misdirected himself on the illegality point.

Now, the proper approach to a case as the present is not in doubt. The governing principle is well-settled. It is this. The question whether a particular bargain is expressly or by necessary implication prohibited by a statute is one that falls to be determined by construing the relevant statute. This is so even where the particular statute imposes a penalty for its breach. As for authority, we find it unnecessary to do more than remind ourselves of what was said by Edgar Joseph Jr FCJ in *Co-operative Central Bank Ltd (in receivership) v. Feyen Development Sdn Bhd* [1995] 4 CLJ 300 at p. 307:

> Nevertheless, the general rule is that a contract, the making of which is prohibited by statute expressly or by implication, and which stipulates for penalties for those entering into it, shall be void and unenforceable, unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself. (*See Holman v. Johnson* [1775] 98 ER 1120 at p. 1121; *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57.) However, the general rule is subject to exceptions and, at the end of the day, it is a question of construction of the particular statute. This point was aptly put by *Gibbs CJ in Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd* [1978] 139 CLR 410 thuswise:
>
> > It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as has been said

> in many cases of authority, that the test is whether the contract is prohibited by the statute. *Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.* (Emphasis added.)

Learned counsel for the defendant also argued that the word "acting" in s. 2 would include a single act as in the present case. In other words, an isolated "acting" is sufficient to fall within the parameters of the Act. He says that it is therefore no answer for the plaintiff to say that his "acting" is an isolated incident and not a continuous activity; it is nevertheless within the terms of the Act and since he had no licence as required by the Act to carry on estate agency practice, his claim must fail. Counsel also submits that the court below fell into error by resorting to cases decided under the Moneylenders Act 1951 for guidance because under the former statute a system of carrying on the business of moneylending is necessary.

With respect, we are unable to accept these submissions. They overlook the passage in the joint judgment in *Gibb v. Federal Commissioner for Taxation* to which we have already referred. Equally, they overlook the well-settled principle that words appearing in a section in a statute must be read in their proper context. This is in accordance with well settled guidelines for the interpretation of statutes. We will, later in this judgment, refer to authority that supports our view. What we need say for the present is that the word "acting" in the definition clause must be read contextually, that is to say, in the context of s. 22C. That section contemplates someone who "practises as" or who may "carry on business" as "an estate agent". (See s. 22C(1a)and (aa)). Special notice should also be taken of the use of the word "practise" in the opening words of s. 22C(1).

Two points need to be made immediately. First, the section uses language that requires some system. Words such as "practise", "carry on business" point to a course of conduct: not to an isolated act. It is not unlike the Moneylenders Act cases. There too, a course of conduct or system is called for: see, *Yeep Mooi v. Chu Chin Chua & Ors* [1981] 1 MLJ 14; *Shamsudin v. Vijeyacone* [1971] 1 MLJ 7. It follows that the High Court did not fall into error by seeking assistance from those cases. Secondly, the section uses the term "estate agent". It is thus clear that the Act requires an estate agency relationship to exist between parties. In the absence of such a relationship the Act has no application. Whether such a relationship exists in a given case is a question of fact depending upon the facts and circumstances of each case.

In the present instance, the High Court specifically negatived the existence of such a relationship. Indeed, it was the defendant's pleaded case – the very case upon which evidence was led – that there was no agency relationship between the parties. The High Court accepted that contention. But the High Court refused to accede to the defendant's further contention that the plaintiff had not been promised a payment if he introduced a piece of land to the defendant. It found the other way. And that finding is amply supported by the evidence.

This is how the judgment under appeal puts it:

> In respect of the second factor, whether: the plaintiff had offered any professional advice or rendered any professional services as an estate agent for the claim of his commission, I shall now consider his actual occupation and his claim of the limited occasion that he had engaged himself in the activity of introducing land for purchase or sale. On these assertions by the plaintiff there was no contention from the defendants that they are untrue. The plaintiff is not qualified as a person registered under Part III of the Act. His only knowledge was in respect of the existence of the Land for sale and that he could put a prospective purchaser in contact with the Vendors. For this, I find that what he did does not qualify him to be within the category of a person who had given professional advice or professional services to the defendants as an estate agent.

We are unable to discern any error in the foregoing passage. Indeed, it is our judgment that the High Court is correct in point of fact and in point of law. It is correct on the facts because, as we have said, the documentary and other evidence amply justify the factual finding it made. It is correct in law because the court adopted a contextual approach to the construction of s. 22C of the Act.

Here we reiterate that it is s. 22C that requires interpretation. And that interpretation must be contextual, based on the language employed by the section itself. As Mason J said in *K & S Lake City Freighters Pty Ltd v. Gordon & Gotch Ltd* (1985) 60 ALR 509 at 514:

> Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.

With regard to the complaints made by learned counsel for the defendant upon the passage quoted in para. 13 of this judgment we would say this. It is quite possible that we may have expressed ourselves in language different from that employed by the court below to state its findings on this part of the case. But that is no ground for saying that the High Court misdirected itself. As we have already said, we find the directions that the court below administered unto itself to be entirely accurate.

It is we think appropriate at this stage to mention two conflicting decisions of the High Court, on the interpretation of the Act. In *Teh Swee Lian v. Teh Eng Peng* [1998] 1 CLJ Supp 504, Azhar Maah J correctly held, on the facts before him that an isolated act did not constitute a holding out by the plaintiff and that evidence of system was necessary to prove estate agency practice. On the other hand, in *Lim Eng Heng v Lim Sam Keow* [2003] 6 CLJ 1, Su Geok Yiam JC appears to have held on the facts before her that an isolated transaction fell within the terms of the Act so that the plaintiff's claim in that case was tainted with illegality. We would agree that what appears to be an isolated act may amount to estate agency practice if evidence of a system of such acts is established to the satisfaction of the court. This is what happened in *Shamsudin v. Vijeyacone*. But if by her judgment the judicial commissioner meant to say that as a matter of law an isolated transaction would fall within s. 22C, then we respectfully say that that case was wrongly decided.

For the reasons already given, this appeal must fail. It is dismissed and those orders made that are usually consequent upon a dismissal.

Before we conclude, we would say that it is the assistance that counsel on both sides rendered us on Monday that enabled us to reserve and deliver our written reasons on this appeal today. It is therefore appropriate that we convey our gratitude to counsel for their careful argument in this case.